IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 39

THE NEW YORK TIMES COMPANY,
A Corporation,
Petitioner,

v.

L. B. SULLIVAN,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

MOTION OF THE WASHINGTON POST COMPANY FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

Pursuant to Rule 42 of the Rules of this Court, The Washington Post Company, a Delaware corporation, by its attorneys, William P. Rogers, Gerald W. Siegel and Stanley Godofsky, respectfully moves this Court for leave to file the annexed brief as *amicus curiae* in support of petitioner herein. Petitioner has consented to the filing of this brief. Respondent has refused such consent.

The Washington Post Company publishes the WASHINGTON POST TIMES-HERALD, a major newspaper in the District of Columbia, and has extensive interests in the magazine, radio and television industries. Because of its widespread involvement in diverse media of mass communication, The Washington Post Company is vitally concerned

with the issues involved in this litigation, touching, as they do, upon the fundamental freedoms of speech and of the press guaranteed by the First and Fourteenth Amendments to the Constitution of the United States. These issues far transcend the interests of the immediate litigants and their resolution will have a far reaching effect upon the future conduct of all media of mass communication.

For the reasons heretofore assigned, and upon the proposed *amicus* brief annexed hereto, The Washington Post Company respectfully requests that this motion be granted.

Respectfully submitted,

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INDEX

PAGE

THE ISSUES PRESENTED 2

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 10

ARGUMENT

I. RESPONDENT MAY NOT CONSTITUTIONALLY INVOKE THE CIVIL LIBEL LAWS TO PUNISH UTTERANCES NOT RELATING TO HIM OR, IF SO RELATING, WHICH ARE ESSENTIALLY TRUE 11

II. THE FIRST AMENDMENT PROTECTS CRITICAL UTTERANCES MADE IN GOOD FAITH RESPECTING CONDUCT IN OFFICE OF PUBLIC OFFICIALS 19

III. THE AWARD OF PUNITIVE DAMAGES IN THIS CASE ITSELF CONSTITUTES AN ABRIDGEMENT OF CONSTITUTIONAL PROTECTIONS 25

IV. THE EXERCISE OF JURISDICTION BY ALABAMA OVER THE NEW YORK TIMES VIOLATES FREEDOM OF THE PRESS AS WELL AS GENERAL CONCEPTS OF PERMISSIBLE STATE COURT JURISDICTION 28

CONCLUSION 37

TABLE OF CASES

Abrams v. *United States*, 250 U. S. 616 (1919) 19

Alabama Ride Co. v. *Vance*, 235 Ala. 263, 178 So. 438 (1938) 15

Bantam Books, Inc. v. *Sullivan*, 372 U. S. 58 (1963) 27

Beauharnais v. *Illinois*, 343 U. S. 250 (1952) ..12, 20, 24

PAGE

Boman v. *Birmingham Transit Company*, 280 F. 2d 531 (5th Cir. 1960) 3

Brewster v. *Boston Herald-Traveler Corporation*, 141 F. Supp. 760 (D. Me. 1956) 36

Bridges v. *California*, 314 U. S. 252 (1941) 11

Browder v. *Gayle*, 142 F. Supp. 707 (M. D. Ala. 1956), *aff'd* 352 U. S. 903 (1956), *reh. den.* 352 U. S. 950 (1956) 3

Cafeteria Union v. *Angelos*, 320 U. S. 293 (1943) .. 23

Cantwell v. *Connecticut*, 310 U. S. 296 (1940) .. 11, 23, 34

Chaplinsky v. *New Hampshire*, 315 U. S. 568 (1942) 24

Craig v. *Harney*, 331 U. S. 367 (1947) 12

Crowell-Collier Pub. Co. v. *Caldwell*, 170 F. 2d 941 (5th Cir. 1948) 26

Davis v. *R. K. O. Radio Pictures*, 191 F. 2d 901 (8th Cir. 1951) 13

DeJonge v. *Oregon*, 299 U. S. 353 (1937) 12

Differential Steel Car Co. v. *MacDonald*, 180 F. 2d 260 (6th Cir. 1950) 18

Doherty & Co. v. *Goodman*, 294 U. S. 623 (1935) .. 35

Dolce v. *Atchison, Topeka & Santa Fe Railway Co.*, 23 F. R. D. 240 (E. D. Mich. 1959) 36

Ex parte Cullinan, 224 Ala. 263, 139 So. 255 (1931) 28

Ex parte Haisten, 227 Ala. 183, 149 So. 213 (1933) 28

Farmers Union v. *WDAY*, 360 U. S. 525 (1959) ... 22

Fitzpatrick v. *Age-Herald Pub. Co.*, 184 Ala. 510, 63 So. 980 (1913) 13

Fleckenstein v. *Friedman*, 266 N. Y. 19, 193 N. E. 537 (1934) 15

Fort Worth Press Co. v. *Davis*, 96 S. W. 2d 416 (Tex. Civ. App. 1936) (not officially reported) 15

Garner v. *Louisiana*, 368 U. S. 157 (1961) 13

Gober, et al. v. *City of Birmingham*, 373 U. S. 374 (1963) 12

PAGE

Gomillion v. *Lightfoot*, 364 U. S. 339 (1960) 3
Grosjean v. *American Press Co.*, 297 U. S. 233 (1936) 31

Hanson v. *Denckla*, 357 U. S. 235 (1958) 29, 35
Hess v. *Pawloski*, 274 U. S. 352 (1927) 35

In re Wallace, 170 F. Supp. 63 (M. D. Ala. 1959) .. 3
Internat. Shoe Co. v. *Washington*, 326 U. S. 310 (1945) 30, 35

Johnson Publishing Co. v. *Davis*, 271 Ala. 474, 124 So. 2d 441 (1960) 27
Joseph Burstyn, Inc. v. *Wilson*, 343 U. S. 495 (1952) 23

Kingsley Pictures Corp. v. *Regents*, 360 U. S. 684 (1959) 19
Kirkpatrick v. *Journal Pub. Co.*, 210 Ala. 10, 97 So. 58 (1923) 15
Konigsberg v. *State Bar*, 366 U. S. 36 (1961) 24

Lauricella v. *Evening News Pub. Co.*, 15 F. Supp. 671 (E. D. N. Y. 1936) 36
Layne v. *Tribune Co.*, 71 F. 2d 223 (D. C. Cir. 1934), *cert. den.* 293 U. S. 572 (1934) 34
Le Vecke v. *Griesedieck Western Brewery Co.*, 233 F. 2d 772 (9th Cir. 1956) 36
Lindheimer v. *Illinois Tel. Co.*, 292 U. S. 151 (1934) 18
Lovell v. *Griffin*, 303 U. S. 444 (1938) 11, 32
Lucy v. *Adams*, 134 F. Supp. 235 (N. D. Ala. 1955), *aff'd Adams* v. *Lucy*, 228 F. 2d 619 (5th Cir. 1955) 3
Lucy v. *Adams*, 350 U. S. 1 (1955) 3
Lucy v. *Adams*, 228 F. 2d 620 (5th Cir. 1955) 3

Marcus v. *Search Warrant*, 367 U. S. 717 (1961) .. 27
Marsh v. *Alabama*, 326 U. S. 501 (1946) 11
McGee v. *International Life Ins. Co.*, 355 U. S. 220 (1957) 35
Murdock v. *Pennsylvania*, 319 U. S. 105 (1943) 11

N. A. A. C. P. v. *Alabama*, 357 U. S. 449 (1958) .. 3, 12
N. A. A. C. P. v. *Button*, 371 U. S. 415 (1963) 12, 19

PAGE

National Labor Rel. Board v. *Brown-Brockmeyer Co.*, 143 F. 2d 537 (6th Cir. 1944) 23

Neely v. *Philadelphia Inquirer Co.*, 62 F. 2d 873 (D. C. Cir. 1932) 34

New York Times Company v. *Conner*, 291 F. 2d 492 (5th Cir. 1961), *vacated*, 310 F. 2d 133 (5th Cir. 1962) 8

Norris v. *Alabama*, 294 U. S. 587 (1935) 12

O'Neil v. *Vermont*, 144 U. S. 323 (1892) 27

Orange Crush Grapico Bottling Co. v. *Seven-Up Company*, 128 F. Supp. 174 (N. D. Ala. 1955) 28

Parks v. *New York Times Company*, 195 F. Supp. 919 (N. D. Ala. 1961), 308 F. 2d 474 (5th Cir. 1962), *Pet. for cert. filed* (Dec. 21, 1962, No. 687, 1962 Term, renumbered No. 52, 1963 Term) 7

Perkins v. *Benguet Mining Co.*, 342 U. S. 437 (1952) 35

Robinson v. *California*, 370 U. S. 660 (1962) 27

Rosenberg Co. v. *Curtis Brown Co.*, 260 U. S. 516 (1923) 30

Roth v. *United States*, 354 U. S. 476 (1957) 16, 24

Schneider v. *State*, 308 U. S. 147 (1939) 11

Shelton v. *Tucker*, 364 U. S. 479 (1960) 27, 31

Shuttlesworth v. *Birmingham*, 373 U. S. 262 (1963) .. 12

Smith v. *California*, 361 U. S. 147 (1959) 20

Speiser v. *Randall*, 357 U. S. 513 (1958) 27, 31

State of Washington v. *United States*, 214 F. 2d 33 (9th Cir. 1954), *cert. den.* 348 U. S. 862 (1954) 18

Sweeney v. *Patterson*, 128 F. 2d 457 (D. C. Cir. 1942), *cert. den.* 317 U. S. 678 (1942) 25

Talley v. *California*, 362 U. S. 60 (1960) 32

Taylor v. *Mississippi*, 319 U. S. 583 (1943) 19

Terminiello v. *Chicago*, 337 U. S. 1 (1949) 19, 33

Thomas v. *Collins*, 323 U. S. 516 (1945) 11

Thompson v. *Louisville*, 362 U. S. 199 (1960) 13

Thornhill v. *Alabama*, 310 U. S. 88 (1940) .. 11, 16, 24, 33

PAGE

Times Film Corp. v. *Chicago*, 365 U. S. 43 (1961) .. 24
Toepelman v. *United States*, 263 F. 2d 697 (4th Cir. 1959), *cert. den.* 359 U. S. 989 (1959) 27
Travelers Health Ass'n v. *Virginia*, 339 U. S. 643 (1950) 35
Trop v. *Dulles*, 356 U. S. 86 (1958) 27
U. S. v. *Spaulding*, 293 U. S. 498 (1935) 18
United States v. *Associated Press*, 52 F. Supp. 362 (S. D. N. Y. 1943), *aff'd* 326 U. S. 1 (1945) 33
United States v. *Donahue*, 66 F. 2d 838 (8th Cir. 1933) 18
United States v. *Rumely*, 345 U. S. 41 (1953) 33
Weems v. *United States*, 217 U. S. 349 (1910) 27
Whitaker v. *Macfadden Publications*, 105 F. 2d 44 (D. C. Cir. 1939) 34
Wood v. *Georgia*, 370 U. S. 375 (1962) 12, 19, 34
Zoll v. *Allen*, 93 F. Supp. 95 (S. D. N. Y. 1950) 15

UNITED STATES CONSTITUTION

Amendment I 1, 10, 11, 24, 27, 31
Amendment VIII 27
Amendment XIV 2, 27

STATUTE

Title 14, Alabama Code, §§ 347, 350 27

TABLE OF AUTHORITIES

PAGE

Justice Black and First Amendment "Absolutes": A Public Interview, 37 N. Y. U. Law Review 549 (June 1962) 20, 27

Ernst, *First Freedom* 93 (1946) 33

Executive Order 11111 (June 11, 1963), 28 Fed. Reg. 5709 (June 12, 1963) 3

Presidential Proclamation 3542 (June 11, 1963), 28 Fed. Reg. 5707 (June 12, 1963) 3

Meiklejohn, *The First Amendment Is Absolute*, 1961 Supreme Court Review 245 20

1 Harper and James, *The Law of Torts* 366 (1956 Ed.) 13

3 Rest. Torts § 564, comment b 13, 18

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BRIEF OF THE WASHINGTON POST COMPANY AS AMICUS CURIAE IN SUPPORT OF PETITIONER

This case presents the fundamental question whether the State of Alabama may constitutionally so apply its libel laws as to suppress and punish expressions of support for the cause of racial equality and, in so doing, attempt to deny to those actively engaged in that cause access to media of mass communication. We submit that any such action is prohibited by the provisions of the First Amendment to the Constitution which specifically forbid any abridgement of freedom of speech or of the press.

The Washington Post Company, as the publisher of a leading newspaper in the District of Columbia, and with interests in the magazine, radio and television fields, has a vital and immediate concern in the preservation of these

fundamental freedoms. For this reason, The Washington Post Company determined to submit an *amicus* brief to this Court and, in accordance with Rule 42 of the Rules of this Court, requested permission of the parties to file this brief. Permission was granted by The New York Times Company (hereinafter "New York Times"), but denied by respondent. Accordingly, a motion for leave to file this brief is being submitted to the Court simultaneously herewith.

THE ISSUES PRESENTED

The principal issue presented by this case is whether the libel laws of the State of Alabama may, consistent with the First and Fourteenth Amendments to the Constitution of the United States, be used to punish and suppress expressions of support for the cause of racial equality and if so, whether the punishment can take the form of a penalty of half a million dollars.

Also presented is the question whether a newspaper may constitutionally be subjected to the jurisdiction of a state with which it has had but peripheral or intermittent contacts, and those principally in connection with its activities in gathering and disseminating news.

STATEMENT OF THE CASE

Born of almost a century of frustration, humiliation and despair, a widespread, far-reaching movement for full and complete racial equality has developed among American Negroes within the past decade. The emergence of this movement has evoked an emotional, and at times violent, reaction among its opponents. Nowhere, with the possible exception of Mississippi, has the reaction been more persistent and sustained than in Alabama.

The tensions engendered by this struggle have resulted in the bombing of religious institutions and private homes

(P. Ex. 165, 166, 198, 348; R. 1549-55, 1557, 1618-19, 1937), the burning of fiery crosses (P. Ex. 165; R. 1550), and the whipping up of hysterical mobs to fever pitch (P. Ex. 124, 166, 168; R. 1413-15, 1556-63, 1565-67). The *Autherine Lucy* case;[1] the redistricting of Tuskegee;[2] the attempt to suppress the N. A. A. C. P.;[3] the threat to close down the public schools;[4] the Montgomery and Birmingham bus desegregation controversies;[5] the refusal of Judge (now Governor) Wallace to honor a Federal Civil Rights Commission subpoena;[6] the flouting by the Governor of Alabama, just a few short months ago, of a Federal Court injunction directing him not to interfere with the admission of certain qualified Negro students to the University of Alabama;[7] these and many other less widely publicized events form the background against which this litigation must be viewed.

The Reverend Martin Luther King, Jr. is one of the leaders of the civil rights movement. He first achieved national prominence in 1956, when, as President of the Montgomery Improvement Association, he led the successful drive to force the desegregation of Montgomery's bus lines (P. Ex. 119, 121, 122, 150; R. 1386-88, 1399-1404,

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[1] *Lucy* v. *Adams*, 134 F. Supp. 235 (N. D. Ala. 1955), *aff'd* *Adams* v. *Lucy*, 228 F. 2d 619 (5th Cir. 1955); *Lucy* v. *Adams*, 350 U. S. 1 (1955); *Lucy* v. *Adams*, 228 F. 2d 620 (5th Cir. 1955); P. Ex. 120, 123, 127, 128; R. 1388-98, 1410-13, 1422-26, 1426-31.

[2] *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960).

[3] *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449 (1958).

[4] P. Ex. 176; R. 1586.

[5] *Browder* v. *Gayle*, 142 F. Supp. 707 (M. D. Ala. 1956), *aff'd.* 352 U. S. 903 (1956), *reh. den.* 352 U. S. 950 (1956); *Boman* v. *Birmingham Transit Company*, 280 F. 2d 531 (5th Cir. 1960); P. Ex. 119, 121, 122; R. 1386-88, 1399-1404, 1408-10.

[6] *In re Wallace*, 170 F. Supp. 63 (M. D. Ala. 1959); P. Ex. 154, 155, 224; R. 1515-17, 1518-20, 1647-49.

[7] Presidential Proclamation 3542 (June 11, 1963), 28 Fed. Reg. 5707 (June 12, 1963); Executive Order 11111 (June 11, 1963), 28 Fed. Reg. 5709 (June 12, 1963).

1406-10, 1514). Over the years, as President of the Southern Christian Leadership Conference, he has become the recognized spokesman for the non-violent passive resistance movement in the South (P. Ex. 347; R. 1925-29).

Because of his activities in support of the cause of civil rights, Dr. King has long been the subject of what has seemed to many to be an unremitting campaign of harassment and oppression. For example, in 1956 during the height of the Montgomery bus desegregation controversy, his home was the object of repeated bombing and gunshot attacks (P. Ex. 147, 198, 348; R. 1501, 1619, 1937). In that same year, he was indicted and convicted of violating the Alabama Criminal Boycott Statute, based upon activities incident to the desegregation of the Montgomery bus lines (P. Ex. 198; R. 1618-19). Again, in 1956, he was arrested for speeding and in 1958 for loitering (P. Ex. 348; R. 1934).

These "speeding" and "loitering" offenses were of a relatively minor nature. On February 29, 1960, however, he was arrested on an indictment charging two counts of perjury in connection with the filing of his Alabama State Income Tax Returns (P. Ex. 348; R. 1934), a serious criminal charge, carrying a maximum penalty of ten years imprisonment upon conviction (P. Ex. 348; R. 1937).

It was widely believed that Dr. King's indictment was politically motivated and without substantial foundation.[3] A "Committee To Defend Martin Luther King And The Struggle For Freedom In The South" was formed and, on March 29, 1960, it published in the New York Times the advertisement which gave rise to the litigation presently before this Court.

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[3]In fact, the trial of Martin Luther King, Jr. resulted in his acquittal on both counts of the indictment against him (R. 680).

The advertisement, entitled "Heed Their Rising Voices", is essentially a political appeal. The text begins (P. Ex. 347; R. 1925):

> "As the whole world knows by now, thousands of Southern Negro students are engaged in widespread non-violent demonstrations in positive affirmation of the right to live in human dignity as guaranteed by the U. S. Constitution and the Bill of Rights. In their efforts to uphold these guarantees, they are being met by an unprecedented wave of terror by those who would deny and negate that document which the whole world looks upon as setting the pattern for modern freedom . . . ."

Without identifying or naming any particular individual, or fixing any particular time, the advertisement then refers to certain specific incidents of claimed repression in Montgomery, Alabama and Orangeburg, South Carolina, and adverts to still other such incidents in Tallahassee, Atlanta, Nashville, Savannah, Greensboro, Memphis, Richmond and Charlotte.

Asserting that Martin Luther King "symbolizes the new spirit now sweeping the South" and that his "doctrine of non-violence . . . has inspired and guided the students in their widening wave of sit-ins . . ." the appeal continues (R. 1926-27):

> "Again and again the Southern violators [of the Constitution] have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times—for 'speeding,' 'loitering' and similar 'offenses.' And now they have charged him with 'perjury'—a felony under which they could imprison him for ten years. Obviously, their real purpose is to remove him physically as the leader to whom the students and millions of others—look for guidance

and support, and thereby to intimidate all leaders who may rise in the South. Their strategy is to behead this affirmative movement, and thus to demoralize Negro Americans and weaken their will to struggle. The defense of Martin Luther King, spiritual leader of the student sit-in movement, clearly, therefore, is an integral part of the total struggle for freedom in the South."

The appeal concludes with the following plea for funds (R. 1927):

> "We must extend ourselves above and beyond moral support and render the material help so urgently needed by those who are taking the risks, facing jail, and even death in a glorious re-affirmation of our Constitution and its Bill of Rights.
>
> "We urge you to join hands with our fellow Americans in the South by supporting, with your dollars, this Combined Appeal for all three needs—the defense of Martin Luther King—the support of the embattled students—and the struggle for the right-to-vote."

The appeal was endorsed by prominent political personalties such as Mrs. Eleanor Roosevelt and Norman Thomas; religious leaders such as Dr. Harry Emerson Fosdick, Rabbi Edward Klein and Dr. Algernon Black; and a host of persons prominent in other fields of endeavor.

Despite the attempt below to characterize the publication of the advertisement by the New York Times as an act of "bad faith" (R. 1178), and to infer therefrom "its maliciousness" to respondent (*Ibid.*), the undisputed record facts disclose that the advertisement was published under circumstances which, by no stretch of the imagination could be characterized as anything other than complete good faith. On this issue, the Manager of the Advertising Acceptability Department of the New York Times testified (R. 758):

"Q. Did you have any knowledge or any information before you at that time from whatever source you may have gained that information and knowledge by reading or talking to someone else or anything that caused you to believe that anything in it was false?

"A. I did not.

"Q. And after reading it and not having before you anything that would cause you to believe that it was false, did you O. K. it for acceptance as an editorial type ad to be run as a paid advertisement in The Times?

"A. I did."

And further (R. 758):

"Q. Did anything you read in that ad cause you to believe that any of the contents of it were false?

"A. Nothing whatsoever. No, sir.

"Q. And not believing that any of the contents were false, did you place any reliance on any other factor or any other thing about that by which you concluded that the contents were true—not believing it to be false, and if so, tell the jury what is was?

"A. Yes, I did, and it was because the ad was endorsed by a number of people who are well known and whose reputation I had no reason to question."

The publication of the advertisement stirred up a storm of protest in Alabama. Libel actions, based upon the March 29th advertisement, were promptly commenced by the three incumbent City Commissioners of Montgomery, by a former City Commissioner, and by the then Governor of Alabama. Millions in damages were demanded.[8]

Nor were these litigations merely isolated instances. On the contrary, they appear to have been part of a broad

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[8]See *Parks* v. *New York Times Company*, 195 F. Supp. 919, 921 (N. D. Ala. 1961), 308 F. 2d 474, 476 (5th Cir., 1962), *Pet. for cert. filed* (Dec. 21, 1962, No. 687, 1962 Term, renumbered No. 52, 1963 Term). See also *Pet. for Certiorari*, No. 606, 1962 Term, p. 19.

attempt by officials in Alabama to invoke the libel laws against all those who had the temerity to criticize Alabama's conduct in the intense racial conflict. Thus, seven libel suits were commenced in Alabama against the New York Times based upon an article written by Harrison Salisbury concerning racial conflict in the State; and at least five Alabama officials filed libel actions against the Columbia Broadcasting System, based upon its television coverage of the conflict.[10]

Respondent commenced his action, seeking damages of $500,000, on April 19, 1960, only twenty-one days after the publication of the advertisement in question. The complaint, in two counts, alleges that respondent was defamed by the March 29, 1960, appeal "and particularly the following false and defamatory matter therein contained" (R. 2-3):[11]

> "'In Montgomery, Alabama, after students sang, "My Country, 'Tis of Thee" on the Capitol steps, their Leaders were expelled from school, and truckloads of police armed with shotguns and tear gas ringed the Alabama State College campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission.
>
> "'Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times—

[10] See *New York Times Company* v. *Conner*, 291 F. 2d 492, 493 (5th Cir., 1961), *vacated*, 310 F. 2d 133 (5th Cir., 1962); See also *Pet. for Certiorari*, No. 606, 1962 Term, p. 19.

[11] At the trial, no attempt was made to rely upon any portions of the advertisement other than those quoted herein.

for "speeding," "loitering" and similar "offenses." And now they have charged him with "perjury"—a *felony* under which they could imprison him for ten years.'"

Although the form of complaint suggests that the two paragraphs complained of followed one another in consecutive order, the first paragraph is, in fact, separated from the second by two lengthy paragraphs, one relating to events in southern states other than Alabama, and the other eulogizing Dr. Martin Luther King as a leader in the passive resistance movement.

A motion was made attacking jurisdiction of the court over the person of the New York Times (R. 39-48), which motion was denied after a hearing (R. 49-57).

At the trial on the merits, it was established that respondent, Sullivan, had become Police Commissioner of Montgomery on October 5, 1959 (R. 694). Six witnesses testified that they had associated all (R. 635, 636, 645, 650, 663) or portions (R. 605, 616, 618, 640) of the above-quoted material with respondent. None of the witnesses testified that they believed the statements contained in the advertisement, and five of the six testified affirmatively that they did not believe any of such statements (R. 623, 636, 638, 647, 651, 667).

Although no actual damages were or could be shown, the jury, nevertheless, returned a verdict in favor of respondent of $500,000, an award which, on the record now before this Court, can only be characterized as punitive (R. 721-24). It found not only against the New York Times (which, concededly, had published the advertisement in question), but also against four Negro ministers prominent in the civil rights movement in the South whose names appeared, without authorization (R. 788, 792, 797, 801), as sponsors of the advertisement and who, it is

quite clear, had not the slightest knowledge of, or connection with the preparation, placement or publication of the advertisement in question (R. 788, 792-93, 797, 801).

That respondent was, in fact, referred to in the advertisement is highly doubtful. It contains no specific reference to him; his name is nowhere to be found; nor is his office as a City Commissioner of Montgomery mentioned or referred to. Respondent himself conceded that many of the statements could not reasonably be read as having any relationship to him (R. 716, 719). Indeed, as we shall demonstrate, the only possible reference to respondent, on any theory, is contained in the statement that "truckloads of police armed with shotguns and tear gas ringed the Alabama State College campus". And that statement is in substance and effect (although not literally) true.

SUMMARY OF ARGUMENT

This is a classic attempt by a state—here the State of Alabama—to abridge the constitutionally protected freedoms of speech and of the press. Despite the fact that Alabama has chosen to characterize the utterances here in question as "libel", this case lacks elements essential to such a cause of action and is, in fact, an unconstitutional attempt, under the guise of the libel laws, to punish and suppress expressions of support for the integration movement in the South. We submit, moreover, that even if this can properly be characterized as a libel case, the utterances here, made, as they were, in complete good faith, are constitutionally protected since they relate, even on respondent's theory, solely to criticism of his conduct as an elected public official. We further submit that because such utterances are basically political in nature, it would, in any event, be incompatible with the First Amendment to permit the imposition of punitive damages for their publication, particularly

in the inordinate and unconscionable amount of half a million dollars.

Also incompatible with the First Amendment, as well as constitutional limitations on the *in personam* jurisdiction of state courts, are the rulings below that the New York Times was subject to suit in Alabama. We submit that those rulings, permitted to stand, will have the inescapable effect of limiting constitutionally protected activities of newspapers.

ARGUMENT

I. RESPONDENT MAY NOT CONSTITUTIONALLY INVOKE THE CIVIL LIBEL LAWS TO PUNISH UTTERANCES NOT RELATING TO HIM OR, IF SO RELATING, WHICH ARE ESSENTIALLY TRUE.

The First Amendment to the Constitution[12] reads in pertinent part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press."

The basic freedoms protected by this amendment have long occupied a preferred position in the legal hierarchy of values. See *e.g.*, *Thomas* v. *Collins*, 323 U. S. 516 (1945); *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943). Indeed, this Court has many times recognized that freedom of speech and of the press lie at the very foundation of free government by free men. See, *e.g.*, *Marsh* v. *Alabama*, 326 U. S. 501, 509 (1946); *Schneider* v. *State*, 308 U. S. 147,

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[12]The guarantees contained in the First Amendment are made applicable to the states by the "due process" clause of the Fourteenth Amendment. *Bridges* v. *California*, 314 U. S. 252, 263 (1941); *Cantwell* v. *Connecticut*, 310 U. S. 296, 303 (1940); *Thornhill* v. *Alabama*, 310 U. S. 88, 95 (1940); *Lovell* v. *Griffin*, 303 U. S. 444, 450 (1938).

161 (1939); *DeJonge* v. *Oregon*, 299 U. S. 353, 364 (1937).

Under our constitutional system, this Court is the ultimate guardian of these fundamental rights, and the State of Alabama may not deprive this Court of its power to vindicate these rights merely by labeling as "libel per se" (R. 823-24, 825, 1155) an utterance for which constitutional protection is sought. Regardless of what label the State of Alabama chooses to attach to the utterance in question, and regardless of what "facts" have been "found" by the Courts below, this Court has the right, indeed the duty, to independently examine the evidence to determine whether the state courts have, in fact, abridged constitutional protections. *Wood* v. *Georgia*, 370 U. S. 375, 386 (1962); *Craig* v. *Harney*, 331 U. S. 367 (1947); *Norris* v. *Alabama*, 294 U. S. 587 (1935).

As was said in *N. A. A. C. P.* v. *Button*, 371 U. S. 415, 429 (1963):

> ". . . a State cannot foreclose the exercise of constitutional rights by mere labels."

Thus, this Court has squarely before it the question whether this is, in fact, a libel case or whether, on the contrary, it is an attempt to suppress constitutionally protected utterances through misuse and misapplication of the libel laws. *Cf. Gober, et al.* v. *City of Birmingham*, 373 U. S. 374 (1963); *Shuttlesworth* v. *Birmingham*, 373 U. S. 262 (1963); *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449 (1958).

More than a decade ago, this Court recognized that it might some day be confronted with this very issue when it said, in *Beauharnais* v. *Illinois*, 343 U. S. 250, 263-64 (1952):

> "'While this Court sits' it retains and exercises authority to nullify action which encroaches on free-

> dom of utterance under the guise of punishing libel. Of course discussion cannot be denied and the right, as well as the duty, of criticism must not be stifled."

We submit that the enchroachment upon freedom of utterance anticipated in *Beauharnais* is exactly what has been attempted here.

An examination of the record discloses that this is not truly a libel suit; for elements essential to such an action are here wholly lacking.[18]

In a civil libel suit, it is a universal rule that a plaintiff may recover only if the utterance claimed to be defamatory speaks "of and concerning" him. See 1 Harper and James, *The Law of Torts*, 366 (1956 Ed.); *Fitzpatrick* v. *Age-Herald Pub. Co.*, 184 Ala. 510, 63 So. 980 (1913). Examination of the advertisement in question discloses that nowhere is there a specific reference to respondent or to his office. Any claim that respondent was, in fact, referred to must, therefore, necessarily rest upon some extrinsic fact which could reasonably lead persons reading the advertisement to believe that respondent was connected in some fashion with the events described therein. *Davis* v. *R. K. O. Radio Pictures*, 191 F. 2d 901, 904-5 (8th Cir. 1951); 3 Rest. Torts § 564, comment b.

Respondent himself conceded that a number of the statements complained of could not reasonably be so read. Thus, with respect to the first paragraph complained of, which reads as follows (P. Ex. 347; R. 1925-26):

> "In Montgomery, Alabama, after students sang 'My Country, 'Tis of Thee' on the State Capitol steps, their leaders were expelled from school, and

[18] Apart from any First Amendment question, therefore, the record here is so devoid of any evidentiary support for the verdict that the judgment below must necessarily be stricken for lack of evidence as a violation of due process. *Cf. Garner* v. *Louisiana*, 368 U. S. 157 (1961); *Thompson* v. *Louisville*, 362 U. S. 199 (1960).

truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission."

respondent testified (R. 716):

"Q. Did you consider that when the statement in the advertisement 'When the entire student body protested to state authorities by refusing to re-register, their dining halls were padlocked in an attempt to starve them into submission,' charged you with having participated in some event wherein a charge was made that a dining hall was padlocked in an attempt to starve somebody and you read that and concluded that you were being charged with doing that?

"A. *That is the responsibility of the State Department of Education and I didn't*——

"Q. Did you——

"Mr. Nachman: Let him answer, Mr. Embry.

"Mr. Embry: Well, I am asking him——

"Mr. Nachman: He is trying to answer——

By Mr. T. Eric Embry: (Continuing)

"Q. Did you consider that it referred to you when you read this ad?

"[fol. 1841] Mr. Nachman: We object to this question until the witness has had an opportunity to answer the previous question, Your Honor.

"The Court: Well, let him answer the question if he can.

"The Witness: As a part of the responsibility of the Police Commissioner and the Commissioner of Public Affairs, it is our responsibility to maintain law and order here in Montgomery whether it is at the campus or elsewhere. *As far as the expulsion of the students is concerned, that responsibility rests*

with the State Department of Education." (Emphasis added)

These admissions, we believe, eliminate from the case all claims relating to statements of fact contained in that paragraph, except the one statement that "truckloads of police armed with shotguns and tear gas ringed the Alabama State College campus." And even this statement cannot serve as the basis of respondent's case.

First, any attempt to associate this statement with respondent rests upon the dubious proposition that it could reasonably be read as implying that the police action referred to in the advertisement was authorized or officially sanctioned by respondent as a City Commissioner of Montgomery.

Second, the statement is substantially true. The record discloses (P. Ex. 347; R. 1937):

> "Never at any time did police 'ring' the campus although on three occasions they were deployed near the campus in large numbers."

If there is any distinction of substance between "ringing" the campus and being "deployed near the campus in large numbers" it is too subtle for us to follow. That any libel verdict—much less a verdict for $500,000 in punitive damages—could rest upon such a basis is beyond our comprehension.[14] Certainly a statement such as this, which is to all intents and purposes true, may not constitutionally

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[14]Under any normal application of the libel laws, at least, such a technical inaccuracy would be wholly insufficient to sustain an action for libel. See *Alabama Ride Co.* v. *Vance*, 235 Ala. 263, 178 So. 438 (1938); *Kirkpatrick* v. *Journal Pub. Co.*, 210 Ala. 10, 97 So. 58 (1923). See also *Fleckenstein* v. *Friedman*, 266 N. Y. 19, 193 N. E. 537 (1934); *Zoll* v. *Allen*, 93 F. Supp. 95 (S. D. N. Y. 1950); *Fort Worth Press Co.* v. *Davis*, 96 S. W. 2d 416 (Tex. Civ. App. 1936) (not officially reported).

serve as the basis for a libel suit. As this Court said in *Thornhill* v. *Alabama*, 310 U. S. 88, 101-2, (1940):

> "The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment."

See also *Roth* v. *United States*, 354 U. S. 476, 488 (1957).

Turning now to the second paragraph, respondent's attempt to establish that anything contained therein could reasonably be said to relate to him rests upon the twin infirmities of tortured logic and strained construction. The language in question reads as follows (R. 3):

> "'Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times—for "speeding," "loitering" and similar "offenses". And now they have charged him with "perjury"—a *felony* under which they could imprison him for ten *years*.'"

To begin with, nothing contained in the second paragraph indicates or even suggests that the events referred to occurred in Montgomery, or for that matter, in the state of Alabama. It is pure conjecture, for example, to read the statement as charging that the Montgomery municipal police arrested Dr. King on seven separate occasions. It is a fact that the Montgomery municipal police did arrest him on three occasions prior to the time when respondent became a City Commissioner (R. 592), but nothing in the record establishes whether or not Dr. King had been arrested on four additional occasions by police elsewhere in Alabama, or in Georgia where he had resided

for some time prior to his indictment for perjury in connection with his Alabama state income taxes (R. 595), or elsewhere.

Another difficulty in attempting to link any of the matters described in the second paragraph with respondent is the fact that the statement nowhere purports to fix the time when the events described therein allegedly took place. So far as the text of the advertisement is concerned, all of the events referred to in the paragraph could have occurred prior to respondent's assumption of office as Police Commissioner on October 5, 1959; and, in fact, so far as relates to the activities of the Montgomery Police Department, all of the events did take place prior to that date (R. 1934).

To cure this fundamental defect, respondent ingenuously testified (R. 719):

> "Q. And what ever may have occurred—the events with respect to any bombing that you heard testimony about—the arrest of this man at the City Hall that you heard testimony about and these arrests made for speeding, loitering and similar offenses and his indictment—this man's indictment—under a charge of falsification of Income Tax Return and for perjury—which of those events occurred after October 5, 1959 and which of those events occurred since you have been holding office as Commissioner of Public Affairs in the City of Montgomery?
>
> "A. *Well, in reading that ad, it would be difficult to tell.* Some of the events did occur before I took office as Commissioner of Public Affairs. At the very beginning of the first paragraph there—the first paragraph that is in question here that when they sang on the Capitol steps—that happened on March 1st of this year, 1960, and it goes on and relates these other incidents in the statement—in the

> ad which my interpretation of it was that they happened after March 1st of 1960." (Emphasis added)

Self-serving and subjective opinion testimony such as this cannot supply an association between respondent and the advertisement complained of which is wholly lacking from the language of the advertisement itself or the events therein described. Regardless of the number of witnesses paraded across the courtroom to testify, for example, that they understood the offending advertisement to charge respondent with responsibility for the bombing of Martin Luther King's home (R. 645, 650, 663), it is impossible on any reasonable basis to construe the language of the advertisement as so charging. See 3 Rest. Torts § 564, comment b.

We submit that all such opinion testimony, unsupported by, and wholly at war with, reality, is worthless. *Cf. Lindheimer* v. *Illinois Tel. Co.*, 292 U. S. 151, 164 (1934). As this Court said in *U. S.* v. *Spaulding*, 293 U. S. 498, 506 (1935):

> "As against the facts directly and conclusively established, this opinion evidence furnishes no basis for opposing inferences."

Accord: *State of Washington* v. *United States*, 214 F. 2d 33, 43 (9th Cir. 1954), *cert. den.* 348 U. S. 862 (1954); *Differential Steel Car Co.* v. *MacDonald*, 180 F. 2d 260, 268 (6th Cir. 1950); *United States* v. *Donahue*, 66 F. 2d 838, 841 (8th Cir. 1933).

In view of the fact that no portion of the advertisement complained of could reasonably be said to relate to respondent, with the possible exception of one statement which is substantially true, the judgment in respondent's favor cannot be viewed as a vindication of his character or reputation. Rather, the interest here vindicated is that of the State of

Alabama in punishing the New York Times for the publication of an unpopular viewpoint on the racial issue. But the fact that the views expressed in the advertisement in question are anathema to a substantial portion of the white community in Alabama is no excuse for invocation of the libel laws. *Taylor* v. *Mississippi*, 319 U. S. 583 (1943).[18] Under the Constitution, men are entitled to speak as they please on public issues. "Under our system of government, counterargument and education are the weapons available to expose these matters, not abridgement of the rights of free speech and assembly." *Wood* v. *Georgia*, 370 U. S. 375, 389 (1962). See also *Terminiello* v. *Chicago*, 337 U. S. 1, 4 (1949); *Abrams* v. *United States*, 250 U. S. 616, 630 (1919) (Holmes, J., dissenting). We submit that despite the rulings below, the advertisement at issue falls squarely within these constitutional principles. A fair reading of the entire advertisement discloses simply an attempt to speak on a crucial public issue—not an attack upon any specific individual.

II. THE FIRST AMENDMENT PROTECTS CRITICAL UTTERANCES MADE IN GOOD FAITH RESPECTING CONDUCT IN OFFICE OF PUBLIC OFFICIALS.

Even respondent must concede that the advertisement in question, if read as referring to him at all, could only be read as referring to his official conduct as a duly elected public official. That defamatory statements concerning such matters present constitutional problems vastly different

[18] Nor can the libel laws constitutionally be invoked because the advertisement in question "was first written by a professional organizer of drives, and rewritten, or 'revved up' to make it more 'appealing'" (R. 1178). For the Constitution protects not only academic discussions, but also advocacy and argument presented in a forceful and dramatic fashion. *N. A. A. C. P.* v. *Button*, 371 U. S. 415, 429 (1963); *Kingsley Pictures Corp.* v. *Regents*, 360 U. S. 684, 688-89 (1959).

from those presented in other situations may be seen from *Beauharnais* v. *Illinois*, 343 U. S. 250 (1952), where this Court said (p. 263 n. 18):

> "If a statute sought to outlaw libels of political parties, quite different problems not now before us would be raised. For one thing, the whole doctrine of fair comment as indispensable to the democratic political process would come into play. See *People* v. *Fuller*, *supra*, at 125, 87 N.E., at 338-339; *Commonwealth* v. *Pratt*, 208 Mass. 553, 559, 95 N.E. 105, 106. Political parties, like public men, are, as it were, public property."

We submit that utterances highly critical of the conduct of public officials in their official capacities which, because of overstatement or exaggeration, may be defamatory, are constitutionally protected, at least where honestly made in the belief that they are true.[18]

The starting point of our analysis is the decision of this Court in *Smith* v. *California*, 361 U. S. 147 (1959). That case involved a Los Angeles city ordinance which made it unlawful for any person to have in his possession an obscene or indecent book in any place of business where books were sold or kept for sale. The ordinance did not require any showing that the book seller had knowledge that the book was obscene or indecent. In holding that the ordinance violated the First Amendment, this Court said (p. 153):

> "By dispensing with any requirement of knowledge of the contents of the book on the part of the seller, the ordinance tends to impose a severe limitation on

[18] It has been forcefully argued that the First Amendment bars all applications of libel laws, see *Justice Black And First Amendment "Absolutes": A Public Interview*, 37 N. Y. U. Law Review 549, (June 1962), or at least that the First Amendment bars all applications of the libel laws to politically motivated speech. See Meiklejohn, *The First Amendment Is Absolute*, 1961 Supreme Court Review 245, 259. This Court need not, however, reach these broad issues here.

> the public's access to constitutionally protected matter. For if the bookseller is criminally liable without knowledge of the contents, and the ordinance fulfills its purpose, he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature."

And further (p. 153-54):

> "If the contents of bookshops and periodical stands were restricted to material of which their proprietors had made an inspection, they might be depleted indeed. The bookseller's limitation in the amount of reading material with which he could familiarize himself, and his timidity in the face of his absolute criminal liability, thus would tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly. The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all books, both obscene and not obscene, would be impeded."

The *Smith* case thus holds that it is unconstitutional to impose punishment for an unknowing and inadvertent dissemination of obscene literature. The considerations advanced in that case in support of the rule there adopted apply, we submit, with equal force to "political" utterances.

In the heat of controversy on political matters, particularly on issues and personalities where strong emotions are aroused, charges and countercharges are often made on the basis of information which, though honestly believed, later turns out to have been incomplete, inaccurate or misleading. On the other hand, it frequently occurs that charges, based upon strong and logically well founded but unprovable suspicions, or upon unconfirmable "inside information," result in ultimate exposure of public incompetence, error, or even misconduct.

Events, activities and decisions which become the subject of political controversy, moreover, are often so complex that the whole truth concerning them can never fully be known. And when, as is frequently the case, the motivation for public acts comes into question, the difficulty of ascertaining the truth becomes infinitely greater.

To prevent newspapers and other media of mass communication from reporting, carrying statements about, or commenting on such matters; to limit, by threat of a libel suit for honest error of fact or judgment, publication of criticism of public officials to that which is absolutely confirmable in every detail would, as a practical matter, stifle virtually all criticism of the government and its personnel, thereby reducing to impotence the democratic process.

As this Court said in *Farmers Union* v. *WDAY*, 360 U. S. 525 (1959), in immunizing radio stations from libel suits based upon speeches of political candidates broadcast pursuant to Section 315 of the Federal Communications Act (pp. 530-31):

> "Whether a statement is defamatory is rarely clear. Whether such a statement is actionably libelous is an even more complex question, involving as it does, consideration of various legal defenses such as 'truth' and the privilege of fair comment. Such issues have always troubled courts. * * * *Quite possibly, if a station were held responsible for the broadcast of libelous material, all remarks evenly faintly objectionable would be excluded out of an excess of caution.* Moreover, if any censorship were permissible, a station so inclined could intentionally inhibit a candidate's legitimate presentation under the guise of lawful censorship of libelous matter. Because of the time limitation inherent in a political campaign, erroneous decisions by a station could not be corrected by the courts promptly enough to permit the candidate to bring improperly excluded matter before the public. *It follows from all this that allow-*

ing censorship, even of the attenuated type advocated here, would almost inevitably force a candidate to avoid controversial issues during political debates over radio and television, and hence restrict the coverage of consideration relevant to intelligent political decision." (Emphasis added)

See also *National Labor Rel. Board* v. *Brown-Brockmeyer Co.*, 143 F. 2d 537, 542 (6th Cir. 1944).

It was undoubtedly the recognition of just such realities which led Mr. Justice Roberts to point out in his classic opinion in *Cantwell* v. *Connecticut*, 310 U. S. 296, 310 (1940):

> "In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. *To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement.* But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, *these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.*
>
> "The essential characteristic of these liberties is, that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed. Nowhere is this shield more necessary than in our own country for a people composed of many races and of many creeds." (Emphasis added)

See also *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 504 (1952); *Cafeteria Union* v. *Angelos*, 320 U. S. 293, 295 (1943).

Prior statements of this Court to the general effect that "libel" is not protected by the First Amendment[17] do not specifically reach the issue here presented. They simply constitute recognition that in most instances libel (like obscenity) has no redeeming social importance which would justify the granting of absolute constitutional protection to all such utterances. *Cf. Roth* v. *United States*, 354 U. S. 476, 484-85 (1957); *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571-72 (1942).

Nor does the decision of this Court in *Beauharnais* v. *Illinois*, 343 U. S. 250 (1952) reach the issue now before the Court since that case is based upon the concept that group libels—like the "fighting words" condemned in *Chaplinsky*—"are no essential part of any exposition of ideas." *Beauharnais* v. *Illinois*, *supra*, at p. 257.[18]

No such statement could be made concerning an utterance made in good faith relating to the conduct in office of a public official. Freedom to criticize and comment in good faith upon such officials and their public conduct is essential to the reaching of intelligent and informed judgments on public matters. This, after all, constitutes one of the principal justifications for the existence of the First Amendment. See *Roth* v. *United States*, 354 U. S. 476, 484, 488 (1957); *Thornhill* v. *Alabama*, 310 U. S. 88, 102 (1940).

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[17] See, *e.g.*, *Konigsberg* v. *State Bar*, 366 U. S. 36, 49-50 (1961); *Times Film Corp.* v. *Chicago*, 365 U. S. 43 (1961); *Roth* v. *United States*, 354 U. S. 476 (1957).

[18] In both the *Beauharnais* and *Chaplinsky* cases the courts below had held (and this Court based its decision on the fact) that the essence of the offenses there involved was the likelihood that the statements in question would incite to violence. This element is wholly absent here.

III. THE AWARD OF PUNITIVE DAMAGES IN THIS CASE ITSELF CONSTITUTES AN ABRIDGEMENT OF CONSTITUTIONAL PROTECTIONS.

One of the most shocking features of this case is the inordinate and unconscionable size of the verdict—half a million dollars in punitive damages where no actual damage was or could be shown.

Even if it were to be conceded that the state has a legitimate interest in protecting its public officials against injury from defamatory statements concerning their public acts, compensatory damages would sufficiently vindicate that interest. Anything further smacks of suppression. As Justice Edgerton said in *Sweeney* v. *Patterson*, 128 F. 2d 457, 458 (D. C. Cir. 1942), *cert. den.* 317 U. S. 678 (1942):

> "Cases which impose liability for erroneous reports of the political conduct of officials reflect the obsolete doctrine that the governed must not criticize their governors.
>
> * * *
>
> "The protection of the public requires not merely discussion, but information. Political conduct and views which some respectable people approve, and others condemn, are constantly imputed to Congressmen. Errors of fact, particularly in regard to a man's mental states and processes, are inevitable. Information and discussion will be discouraged, and the public interest in public knowledge of important facts will be poorly defended, if error subjects its author to a libel suit without even a showing of economic loss. Whatever is added to the field of libel is taken from the field of free debate."

It is difficult to believe, moreover, that the $500,000 verdict here was intended merely to deter publication of insufficiently verified advertisements; or even to punish the

New York Times for refusing to give respondent an unqualified retraction.[19] It seems plain that the true purpose of the award was to wreak vengeance on the New York Times for making its pages available to those advocating the cause of integration in the South, and to deter the New York Times (and all other newspapers and periodicals similarly situated) from ever again making their papers available to those favoring that cause. Permitted to stand, it will indeed deter and prevent news gathering and disseminating institutions from performing the vital democratic function of disclosure and discussion on controversial issues which local newspapers and other media of communication are either unable or unwilling to perform.

In *Crowell-Collier Pub. Co.* v. *Caldwell*, 170 F. 2d 941 (5th Cir. 1948), a case involving a defamatory statement that the Governor of the State of Florida was indifferent to, and approved of, the lynching of Negroes in the state, a jury verdict for $237,500, representing primarily punitive damages, was set aside as excessive and a new trial ordered. The Court held (p. 944):

> "[T]he verdict here was not merely in the ordinary sense an excessive verdict. It was an inordinate one, without precedent or sound legal basis."

The verdict here is more than double that which was condemned in the *Crowell-Collier* case.[20] Coming from a

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[19] The New York Times did not, in fact, refuse respondent such a retraction. Upon receipt of respondent's formal demand, the New York Times, after a preliminary investigation, requested respondent to indicate, if he so desired, in what manner he believed the advertisement referred to him (R. 777; P. Ex. 363; R. 1971). Instead of so indicating, respondent proceeded immediately to commence this litigation (R. 714-15, 777).

[20] This and related litigation excepted, the verdict in *Crowell-Collier* was, so far as we can determine, the largest verdict in a "political" libel case ever to come to the attention of an appellate tribunal.

state where "juries . . . do not believe in political libel suits" (see *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N. Y. U. Law Review 549, 558 (June 1962)), where the maximum monetary penalty for *criminal libel* is $500 (Title 14, Alabama Code, §§ 347, 350), and where, so far as we can discover, apart from this and related litigation,[21] the largest libel verdict ever reported was $67,500,[22] the verdict is almost beyond explanation, except upon a theory of naked repression.

Whether the verdict is so disproportionate to the "offense" and so in conflict with the normal Alabama practice in libel cases as to constitute "cruel and unusual punishment" need not be decided here. See *Weems* v. *United States*, 217 U. S. 349, 371, 382 (1910); *O'Neil* v. *Vermont*, 144 U. S. 323 (1892) (dissenting opinions).[23] For the repressive effect of a half million dollar award of punitive damages upon freedom of expression is so patent, the inhibiting effect upon the presentation of conflicting and controversial political argument so plain, the punishment for such presentation so burdensome and oppressive, that this Court may not, consistent with the First Amendment, permit its imposition. *Cf. Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58 (1963); *Marcus* v. *Search Warrant*, 367 U. S. 717 (1961); *Shelton* v. *Tucker*, 364 U. S. 479 (1960); *Speiser* v. *Randall*, 357 U. S. 513 (1958).

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[21] $500,000 awarded to Commissioner James.

[22] *Johnson Publishing Co.* v. *Davis*, 271 Ala. 474, 124 So. 2d 441 (1960). On appeal the court reduced the judgment to $45,000.

[23] In our view this is indeed a classic case of "cruel and unusual punishment". The "cruel and unusual punishment" provisions of the Eighth Amendment are applicable to the states by virtue of the due process provisions of the Fourteenth Amendment (*Robinson* v. *California*, 370 U. S. 660 (1962)) and are applicable, by analogy at least, to civil actions and proceedings *Toepleman* v. *United States*, 263 F. 2d 697, 700 (4th Cir. 1959), *cert. den.* 359 U. S. 989 (1959); *Cf. Trop* v. *Dulles*, 356 U. S. 86 (1958).

IV. THE EXERCISE OF JURISDICTION BY ALABAMA OVER THE NEW YORK TIMES VIOLATES FREEDOM OF THE PRESS AS WELL AS GENERAL CONCEPTS OF PERMISSIBLE STATE COURT JURISDICTION.

The New York Times is not an Alabama corporation. It is not and has not been licensed to do business in Alabama. Any claim of jurisdiction over the New York Times, therefore, must rest upon (a) contacts between the New York Times and Alabama sufficient to justify subjecting it to jurisdiction there, or (b) its voluntary submission to jurisdiction in Alabama. Both bases were relied on to sustain jurisdiction in the courts below (R. 49-57, 1139-80).

As an *amicus* we are not here concerned with the decisions below so far as they hold that the New York Times had voluntarily submitted itself to the jurisdiction of the Alabama courts by the filing of a "general appearance," although we do note, parenthetically, that even on this issue the decisions below are at variance with prior Alabama practice.[24] We are, however, deeply concerned with the rulings below that the activities of the New York Times relating to Alabama were sufficient to subject the New York Times to jurisdiction in that state. These rulings were based on the following activities of the New York Times in or relating to the State of Alabama:

1. The gathering of news in Alabama through "stringers"[25] and staff correspondents (R. 53-4, 1140-42).

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[24] *Ex parte Haisten*, 227 Ala. 183, 149 So. 213 (1933); *Ex parte Cullinan*, 224 Ala. 263, 139 So. 255 (1931); see also *Orange Crush Grapico Bottling Co.* v. *Seven-Up Company*, 128 F. Supp. 174 (N. D. Ala. 1955).

[25] A stringer obtains and transmits news and other information to an out-of-town newspaper or magazine on a part time, *ad hoc* basis (R. 136, 153). Normally, a stringer is employed by a local

2. The delivery to Alabama of a small number of copies of the New York Times, pursuant to unsolicited requests[26] by Alabama readers and newsdealers (R. 55, 1142-47).

3. The sporadic solicitation of advertising in Alabama and the acceptance of unsolicited advertising from advertisers located within the state (R. 54-5, 1142).

It is beyond dispute that these activities were wholly insubstantial when viewed against the over-all operations of the New York Times,[27] and, except as to news gathering, wholly peripheral to its business of publishing a newspaper serving primarily the New York metropolitan area.

While this Court has, in recent years, expanded and made more flexible the standards under which a nonresident corporation may be subjected to jurisdiction, it has not completely removed all restrictions on the personal jurisdiction of state courts. To the contrary, as this Court said in *Hanson* v. *Denckla*, 357 U. S. 235, 251 (1958):

> "Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation.

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newspaper (R. 136). He is not considered an employee of the out-of-town newspaper, and payments to him are not subject to withholding of income, social security and other taxes normally required to be withheld from employees (R. 141-42). Payments to stringers are made by the New York Times on the basis of material requested or used, at the rate of one cent per word (R. 140).

[26] R. 428.

[27] For example, payments to resident stringers in Alabama during the first five months of 1960 totaled $245—approximately one-tenth of one percent of the total payments to stringers by the New York Times during that period (R. 441-42). Revenues derived from circulation of the New York Times in Alabama during the same period aggregated only 23 hundredths of one percent of total circulation revenues (R. 445) and advertising revenue from Alabama advertisers during the same period represented but 46 thousandths of one percent of the total advertising revenue (R. 443-44).

> They are a consequence of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the 'minimal contacts' with that State that are a prerequisite to its exercise of power over him. See *International Shoe Co.* v. *Washington*, 326 U. S. 310, 319."

Nor by "minimal contact" does this Court mean "any contact." Not every casual, incidental or isolated item of activity is sufficient to subject a non-resident corporation to suit within the jurisdiction (*Internat. Shoe Co.* v. *Washington*, 326 U. S. 310, 317 (1945)) even where the activity within the jurisdiction gives rise to the cause of action sued upon (*Ibid.* p. 318).[28]

As this Court said in *Internat. Shoe Co.* v. *Washington*, *supra*, at p. 319:

> "It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative. The test is not merely, as has sometimes been suggested, whether the activity, which the corporation has seen fit to procure through its agents in another state, is a little more or a little less. *St. Louis S. W. R. Co.* v. *Alexander*, *supra*, 228; *International Harvester Co.* v. *Kentucky*, *supra*, 587. Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure."

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[28] Indeed, even certain forms of regularly recurring activity may not justify the assertion of jurisdiction over a non-resident foreign corporation. *See e.g. Rosenberg Co.* v. *Curtis Brown Co.*, 260 U. S. 516 (1923), cited with approval in *Internat. Shoe Co.* v. *Washington*, *supra*, at p. 318.

We submit that the "quality and nature" of activities which may be considered when dealing with the problem of jurisdiction over newspapers and other media of mass communication is essentially different from that normally considered in connection with the assertion of jurisdiction over other types of businesses. For in dealing with the problem of jurisdiction over media of communications protected by the First Amendment, there must be considered not only the due process problems which are present in every jurisdiction case but also whether and to what extent the assertion of jurisdiction impinges on constitutionally protected freedoms. And particularly is this so where the cause of action arises not out of a normal commercial transaction, but out of the exercise by a newspaper of the very function—*i.e.* publishing—which the First Amendment was intended to protect. *Cf. Shelton* v. *Tucker*, 364 U. S. 479 (1960); *Speiser* v. *Randall*, 357 U. S. 513 (1958).

We turn, first, to the effect which the rulings below must necessarily have on the free circulation of out-of-state newspapers and other publications in Alabama and other states. This Court has repeatedly recognized that freedom of circulation is an integral part of freedom of the press; that state action, whatever its form, which has the effect of limiting such freedom, is prohibited by the First Amendment.

In *Grosjean* v. *American Press Co.*, 297 U. S. 233 (1936), this Court considered a Louisiana tax statute requiring publishers of periodicals having a circulation of more than 20,000 copies per week to pay a gross receipts tax of two percent for the privilege of engaging in business. In holding that the tax violated the First Amendment, Mr. Justice Sutherland, speaking for a unanimous Court, said (p. 250):

> "The predominant purpose of the grant of immunity here invoked was to preserve an untrammeled

> press as a vital source of public information. The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgment of the publicity afforded by a free press cannot be regarded otherwise than with grave concern. The tax here involved is bad not because it takes money from the pockets of the appellees. If that were all, a wholly different question would be presented. It is bad because, in the light of its history and of its present setting, *it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties.* A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves." (Emphasis added.)

Lovell v. *Griffin*, 303 U. S. 444 (1938) involved an ordinance prohibiting the distribution of literature in Griffin, Georgia without the prior written permission of the City Manager. In holding the ordinance unconstitutional this Court said (p. 452):

> "The ordinance cannot be saved because it relates to distribution and not to publication. 'Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.' *Ex parte Jackson*, 96 U. S. 727, 733. The license tax in *Grosjean* v. *American Press Co., supra*, was held invalid because of its direct tendency to restrict circulation."

These well settled principles have but recently been reaffirmed by this Court in *Talley* v. *California*, 362 U. S. 60 (1960). They were, however, plainly ignored in the courts below.

It is difficult to conceive of an instrument more calculated to limit, and indeed suppress, the circulation in states like Alabama of out-of-state newspapers such as the New York Times than the instrument here fashioned by the Alabama state courts. The record is clear (R. 428) that the New York Times is shipped to Alabama only as an accommodation to local readers and newsdealers. The circulation of the New York Times in Alabama is so small[39] as to be financially insignificant to the publisher (R. 445), when measured against its over-all operations. Inevitably, therefore, if the rulings below are sustained, the New York Times, and other out-of-state newspapers similarly situated, will refuse to supply copies of their publications to interested readers in Alabama and other states similarly removed from the area of principal circulation. These newspapers will suffer little or no financial loss from such withdrawal. The principal losers will be the citizens of Alabama and other states, who will be deprived of the opportunity of reading newspapers from other parts of the country.

Equally dangerous to freedom of expression, in our view, is the inhibiting effect which the rulings below will have upon news gathering activities of out-of-state newspapers and other news media.

The standardization of news and opinion has long been the subject of serious concern among those devoted to the successful functioning of the democratic process. *Terminiello* v. *Chicago*, 337 U. S. 1 (1949); *United States* v. *Rumely*, 345 U. S. 41, 56-7 (1953) (Douglas, J. concurring) *United States* v. *Associated Press*, 52 F. Supp. 362, 372 (S. D. N. Y. 1943), *aff'd*, 326 U. S. 1 (1945); see also *Thornhill* v. *Alabama*, 310 U. S. 88 (1940); Ernst, *First*

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[39]The approximate circulation of the New York Times in Alabama is 390 copies on weekdays (R. 402) and 2,400 to 2,500 on Sundays (R. 402).

Freedom, p. 93 (1946). Diversity—not uniformity—is traditionally the soil in which the seed of liberty has flowered. See, *e.g.*, *Wood* v. *Georgia*, 370 U. S. 375 (1963); *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940).

A rule of law which would subject a newspaper to jurisdiction on the basis of its news gathering activities would make publishers of out-of-state newspapers hesitate before dispatching staff correspondents to cover a newsworthy event or obtaining information respecting such an event from local "stringers." The tendency would inevitably be to rely, instead, upon dispatches of the wire services and second hand reports garnered from the reading of local papers, thus accelerating still further the trend toward uniformity.

The importance of freedom to gather first hand information has long received judicial recognition; it is plainly such recognition which lies at the heart of the judicial reluctance to sustain jurisdiction over newspapers and other media of communication on the basis of their news gathering activities. See *Whitaker* v. *Macfadden Publications*, 105 F. 2d 44 (D. C. Cir. 1939); *Layne* v. *Tribune Co.*, 71 F. 2d 223 (D. C. Cir. 1934), *cert. den.* 293 U. S. 572 (1934); *Neely* v. *Philadelphia Inquirer Co.*, 62 F. 2d 873 (D. C. Cir. 1932).

We come, then, to the sole remaining basis upon which the courts below relied in holding that the New York Times was subject to suit in Alabama—i. e., the sporadic (R. 336-38, D. Ex. 1; R. 1978) intermittent (R. 336-38) efforts of the New York Times (R. 337-38) and its wholly-owned subsidiary (R. 331-39, 360-61) to obtain advertising in Alabama and the publication of advertisements, solicited or otherwise, from advertisers within that state (R. 331-85).

We note, initially, that these activities of the New York Times are wholly unrelated to the cause of action here sued

upon, since the advertisement which forms the basis for respondent's cause of action was not solicited or obtained in Alabama or from an Alabama advertiser. *Cf. Internat. Shoe Co.* v. *Washington,* 326 U. S. 310, 319 (1945). In this respect, the problem here is wholly different from that presented in *McGee* v. *International Life Ins. Co.,* 355 U. S. 220 (1957)[30] where the cause of action sued upon arose directly out of activities of the defendant within California. *Hanson* v. *Denckla,* 357 U. S. 235, 251-52 (1958).

The question, therefore, is whether the activities of the New York Times relating to the solicitation of advertising in Alabama, and the publication of advertisements from Alabama sources, are so continuous and substantial as to justify suit against it on causes of action wholly unconnected with such activities. *Cf. Internat. Shoe Co.* v. *Washington,* 326 U. S. 310, 318 (1945).[31] In passing upon that question, we do not believe it would be proper for this Court to take into account the other activities of the New York Times, such as news gathering and distribution, which are constitutionally protected. For if such activities may be considered as part of the totality of contacts for jurisdictional pur-

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[30]This case also differs from the *McGee* case in that jurisdiction in *McGee* was asserted under a statute specifically directed to activities of the type carried on by the defendant and declaring such activities subject to special regulation. *Hanson* v. *Denckla, supra,* at p. 252; *Cf. Travelers Health Ass'n* v. *Virginia,* 339 U. S. 643, 647-49 (1950); *Doherty & Co.* v. *Goodman,* 294 U. S. 623, 627 (1935); *Hess* v. *Pawloski,* 274 U. S. 352 (1927).

[31]*Perkins* v. *Benguet Mining Co.,* 342 U. S. 437 (1952) does not enunciate a different rule. It does not hold that a foreign corporation with minimal contacts in a jurisdiction may be sued there on any cause of action. In that case, the defendant's central base of operations, including its top management, was in the state where the suit was commenced. Under such circumstances, this Court found that its contacts with the State of Ohio were of such a substantial and continuous nature that Ohio could constitutionally subject the defendant to jurisdiction there on any cause of action, whether or not arising out of those activities.

poses, the inhibiting effect would, as a practical matter, be the same as if jurisdiction were to be based upon such activities alone.

Turning, therefore, to the advertising activities of the New York Times in Alabama, we find that during the first five months of 1960 a miniscule percentage of its advertising revenue—46 thousandths of one percent—came from Alabama (R. 443-44). Nor are the figures any more impressive when stated in terms of dollars—$17-18,000 out of total advertising revenues for that period of $37,500,000 (R. 443-44).

These figures, moreover, far overstate the true extent of the New York Times' advertising activities in Alabama since they represent unsolicited advertising submitted to the New York Times in New York by Alabama advertisers as well as advertising solicited in Alabama by the New York Times and its wholly-owned subsidiary. Significantly, only one advertising solicitor on behalf of the New York Times was present in Alabama during the first five months of 1960, and he was there for only one day (D. Ex. 1; R. 1978).

In view of these wholly insubstantial and sporadic advertising contacts with the State of Alabama and the total lack of connection between such contacts and the cause of action here asserted, any attempt to subject the New York Times to jurisdiction on the basis of such contacts must fail. See *Le Vecke* v. *Griesedieck Western Brewery Co.*, 233 F. 2d 772 (9th Cir. 1956); *Dolce* v. *Atchison, Topeka & Santa Fe Railway Co.*, 23 F. R. D. 240 (E. D. Mich. 1959); *Brewster* v. *Boston Herald-Traveler Corporation*, 141 F. Supp. 760, 762, 764 (D. Me. 1956); see also *Lauricella* v. *Evening News Pub. Co.*, 15 F. Supp. 671, 672 (E. D. N. Y. 1936).

CONCLUSION

For each of the reasons heretofore assigned, The Washington Post Company respectfully submits that the judgment below must be reversed.

Respectfully submitted,

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